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No. 80-1875

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

JERRY D. LUPTAK,
Petitioner,

-vs-

CENTRAL CARTAGE CO. and
CENTRA, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does a shareholder of a corporation, who is also an acknowledged potential purchaser of all the shares of that corporation, have standing to obtain injunctive relief for violations of Sections 10(b), 13(d), 14(d) and 14(e) of the Securities Exchange Act of 1934 committed by a person who makes a tender offer for the shares of such corporation.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	5
I. THE DECISION BELOW IS INCONSISTENT WITH A DECISION OF THIS COURT AND OTHER LOWER COURTS	5
The Plaintiff Had Standing to Obtain Relief for Violations of Sections 10, 13 and 14 of the 1934 Act	5
CONCLUSION	11
APPENDIX	
Opinion of the United States Court of Appeals for the Sixth Circuit, entered February 23, 1981	1a
Opinion of the United States District Court, Eastern District of Michigan, Southern Division, entered July 30, 1979	5a
Opinion of the United States District Court, Eastern District of Michigan, Southern Division, entered October 19, 1979	19a
Sections 14(d), 14(e), 10(b), and 13(d) of the Securities Exchange Act of 1934	31a

INDEX OF AUTHORITIES

Cases: Page

Humana, Inc. v *American Medicorp, Inc.*, 445 F. Supp. 613 (S.D.N.Y. 1977) 5

Piper v *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) 5, 6

Securities & Exchange Com. v *Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963) 7

Weeks Dredging & Contracting, Inc. v *American Dredging Co.*, 451 F. Supp. 468 (E.D. Pa. 1978).. 5

Statutes:

Securities & Exchange Act of 1934:

Section 10(b), 13(d), 14(d), 14(e) ..... Multiple

15 U.S.C. §§78j(b), 78m(d), 78n(d), 78n(e) ..... Multiple

Articles:

Standing to Sue Under the Williams Act, The Business Lawyer, Vol. 34, November, 1978 8

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on February 23, 1981, is not reported, and appears in the appendix hereto. The opinions of the United States District Court involved herein were entered on July 30, 1979 and October 19, 1979, were not reported, and appear in the appendix hereto.

JURISDICTION

The decision of the Court of Appeals was entered on February 23, 1971 and this Petition for Certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1245(1).

STATUTES INVOLVED

This case involves Sections 10(b), 13(d), 14(d) and 14(e) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §§78j(b), 78m(d), 78n(d) and 78n(e), the pertinent text of which is set forth in the appendix.

STATEMENT OF THE CASE

This action concerns the purported contest for control of the Ambassador Bridge, an international bridge linking the United States and Canada between Detroit, Michigan and Windsor, Canada. The Ambassador Bridge was owned by the Detroit International Bridge Company ("DIBC"). The American half of the Ambassador Bridge was owned by DIBC directly and the Canadian half was owned by DIBC's wholly owned subsidiary, the Canadian Transit Company ("CTC"), which was organized in 1921 by a special act of the Canadian Parliament. As early as 1972, various persons became interested in acquiring control of DIBC. The common stock of DIBC was registered pursuant to Section 12(g) of the 1934 Act, and traded in the

over-the-counter securities market. Under the laws of Canada, permission was required from the Canadian Government to change control of the Ambassador Bridge.

In 1972 and 1973 the Respondent, Central Cartage Company ("Cartage"), established its toehold position in DIBC by the acquisition of 31,944 (after a stock dividend) shares, or approximately 2.5%, of DIBC's outstanding shares. Thereafter, Cartage took active steps to acquire control of DIBC and sought out a Canadian partner in order to obtain approval from the Canadian government.

In 1975 the Petitioner, Jerry D. Luptak ("Luptak"), a DIBC shareholder, advised the DIBC board that a corporation under his control was interested in acquiring the DIBC shares and that he would attempt to obtain approval from the Canadian government. Luptak subsequently filed a notice with The Foreign Investment Review Agency of Canada for approval of an application to acquire control of CTC as required by the Canadian Foreign Investment Review Act of 1973.

In early 1977, Wesco Financial Corporation ("Wesco"), in two over-the-counter transactions, acquired 92,242 shares of DIBC at $17 per share, which when added to DIBC shares then owned by Wesco's subsidiaries, totaled 134,262 shares, or approximately 10.6% of DIBC's outstanding shares.

On or before September 30, 1977 Wesco determined, unlike the other DIBC suitors, that it did not require permission of Canada to acquire the outstanding shares of DIBC and on that date, it launched a public tender offer at $20 per share for all of the DIBC shares. Cartage, not wishing to see its acquisition efforts go down the drain, determined to aggressively purchase DIBC shares in the over-the-counter market at prices higher than $20 per share in order to defeat Wesco's tender offer, and to obtain control of DIBC. On three days during Wesco's tender offer, before it expired on October 25, 1977, Cartage

purchased 111,100 shares of DIBC at prices between $21 and $21⅞ per share without any public disclosure of its intent to obtain control of DIBC. It is Luptak's claim that Cartage's purchases during the public Wesco tender offer constituted a tender offer within the terms of Section 14 of the 1934 Act.

In the meantime, during the Wesco and Cartage tender offers, Luptak determined to follow the law of Canada and wait for Canadian approval of his acquisition plans. The approval of the Canadian government was issued to Luptak on November 1, 1977. However, by that date, Wesco controlled 24.6% of the DIBC shares and Cartage had approximately 15.22% of the DIBC shares. Cartage continued its purchases of DIBC shares through 1977 and 1978 while this action was pending. In March, 1979 Cartage, through a Canadian partner, purchased Wesco's DIBC shares and thereupon controlled 49.5% of DIBC's outstanding shares.

Luptak filed his First Amended and Supplemental Complaint on April 12, 1979 describing in detail how Cartage had obtained 49.5% of the shares of DIBC through an illegal tender offer and by purchasing Wesco's shares of DIBC. The claims pending against Cartage over which the District Court had jurisdiction pursuant to Section 27 of the 1934 Act (15 U.S.C. 78aa) were proceeding through discovery when, in June, 1979, Cartage issued a proxy statement describing a proposal for a merger for DIBC with a subsidiary of Cartage, which merger proposal, if approved, would eliminate all of DIBC's shareholders other than Cartage, at $25 per share. The merger proposal precipitated the filing of a motion for preliminary injunction by Luptak to restrain Cartage from voting its DIBC shares and other relief to allow Luptak to make a lawful tender offer to the DIBC shareholders, and a motion for partial summary judgment, claiming that Cartage's purchases of DIBC shares during the pendency of the Wesco tender offer constituted a tender offer pursuant to Section 14(d) of the

1934 Act. Cartage brought its own motion for summary judgment, seeking the dismissal of plaintiff's entire complaint based upon plaintiff's alleged lack of standing, and the claim that Cartage had not made an illegal tender offer and that its purchases of DIBC stock did not violate Section 10(b) or 13(d) of the 1934 Act.

The Court denied the preliminary injunction and held in a memorandum opinion dated July 10, 1979 that Cartage was entitled to a summary judgment with respect to Luptak's Section 14 claim on two grounds; that plaintiff lacked standing and that Cartage had not made a tender offer as a matter of law. The court also ruled that Cartage was not entitled to a summary judgment on Luptak's Section 10(b) and 13(d) claims because plaintiff had the requisite standing and that genuine issues of material fact concerning Cartage's misrepresentations and failure to disclose the purpose and intent of its acquisitions of DIBC shares remained to be litigated.

The proposed merger was approved on July 31, 1979. On September 26, 1979, plaintiff filed a motion for separate trial of the relief issue, and claimed therein that the July 31, 1979 merger was then in violation of injunctive orders issued by the Federal Court of Canada on June 19, 1979 and a Michigan state court on July 30, 1979, and that the final parameters of equitable relief could not be determined until resolution of those injunctive orders was obtained. Said motion was never adjudicated by the district court.

On September 29, 1979 Cartage renewed its motion for summary judgment with respect to Luptak's remaining claims, a hearing thereon was held on October 17, 1979 and Judge Freeman concluded in a memorandum opinion entered on October 19, 1979 that notwithstanding the material disputed facts with respect to Luptak's Section 10 and 13 claims, that summary judgment was appropriate because plaintiff lacked standing to assert his remaining claims. An order to that effect was entered on October 30, 1979.

On February 23, 1980 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court and held that Luptak did not have standing to assert his claims of violations of the 1934 Act by Cartage because he had not shown that the relief he sought would benefit the DIBC shareholders. The court did not reach the issue of whether Cartage's purchases of DIBC stock may have constituted an illegal tender offer.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH A DECISION OF THIS COURT AND OTHER LOWER COURTS.

The Plaintiff had Standing to Obtain Relief for Violations of Section 10, 13 and 14 of the 1934 Act.

The district court recognized that a person such as the Petitioner, who was interested in making a tender offer, has standing under *Piper* v *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) to obtain equitable relief. In his memorandum opinion of July 30, 1979, the court cited two cases subsequent to the *Chris-Craft* decision to that effect, *Weeks Dredging & Contracting, Inc.* v *American Dredging Co.*, 451 F. Supp. 468 (E.D. Pa. 1978) and *Humana, Inc.* v *American Medicorp, Inc.*, 445 F. Supp. 613 (S.D.N.Y. 1977) and sumarized the rationale in said cases as follows:

> "The critical inquiry under these decisions, however, is whether the shareholders of the target company would benefit if the allegations of plaintiff's complaint were proven and the relief requested were granted."

In *Humana, Inc.* v *American Medicorp, Inc.*, supra, the court found significant the fact that in his opinion for the majority in *Chris-Craft*, the Chief Justice has "exercised scrupulous care to use the word 'damages' whenever he described the 'narrow' issue before the court" (p. 615), and

that the Supreme Court had cited, with approval, Judge Friendly's observation in *Electronic Specialty Co.* case that preliminary injunctive relief was the most appropriate form of relief that could be given "in corporate control contests" (p. 615), a statement the Supreme Court made on its own in *Chris-Craft*, supra, at 40, n. 16.

The district court in this action concluded that Luptak lacked standing because:

> "In the present case, plaintiff Luptak has not even asserted that any benefit will accrue to the DIBC shareholders if Cartage is enjoined and forced to sell its DIBC shares on the market. Realistically, it appears that precisely the opposite will be true. As this court found in its memorandum opinion of January 24, 1979, court-ordered divestiture could well result in a drop in price of DIBC stock; while such a result would clearly benefit Luptak as a tender offeror, since he could acquire DIBC shares at a reduced price, it certainly would be harmful to current DIBC shareholders. Under the authorities cited, these considerations persuade the Court that Plaintiff Luptak cannot assert standing to sue the remaining defendants in this action for any alleged violations of section 14 of the Act."

The Court of Appeals agreed, stating:

> ". . . Luptak concedes that he has standing to assert this claim only if the relief requested would benefit the shareholders of DIBC. This he has failed to show. The benefits to flow from a possible offer by Luptak are at best conjectural, because he has refused to take any steps beyond seeking approval from Canadian authorities in 1977 toward engaging in an offer. And as noted by the district court, granting Luptak the relief requested may very well harm shareholders of DIBC."

The district court's concern should have been to determine if there was any appropriate remedy to right the

wrongs that Cartage had committed. The court's concern and the availability of a remedy should have focused on the nature of the violations and the underlying purpose of the statutory scheme which was violated. This Court has said that the 1934 Act embraces a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry", *Securities & Exchange Commission* v *Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963).

Assuming Cartage had made an illegal tender offer, at approximately $21 per share, as a step in acquiring 49.5% of the outstanding DIBC shares, should the court's sole concern have been to preserve the ability of Cartage to consolidate its control by offering the remaining DIBC shareholders $25 per share? Should not the court have had a wider view of the best interests of all of the DIBC shareholders in receiving full disclosure, and an equal opportunity to get $25 or some higher or lower price from any one of the competing bidders rather than simply guarding the "right" of the remaining shareholders to receive $25 per share? Should not the court have granted standing to a competitor who sought to eliminate the fruits of Cartage's secret tender offer and to promote a competitive public tender offer contest with full disclosure for the benefit of all of the DIBC shareholders?

The Court of Appeals' conclusion that Luptak, ". . . refused to take any steps beyond seeking approval from Canadian authorities in 1977 toward engaging in an offer", flies in the face of economic reality in that on November 1, 1977, when Luptak obtained Canadian approval, Cartage and another party jointly controlled DIBC following an illegal tender offer. All Luptak has sought, thus far in vain, from the District Court and the Court of Appeals is the right to be heard on his claim that if Cartage made an illegal tender offer, it should be returned to the starting line. The DIBC shareholders are benefitted

and the purposes of the 1934 Act are fulfilled by a fair competitive tender offer with full disclosure by all parties.

Luptak's motion for preliminary injunction requested as part of the relief that all shares be returned to their registered owners. There was no showing that such relief would be impracticable. If that relief had been ordered, there would be no impact other than to restore the market to its pre-Wesco tender offer levels where anyone, including plaintiff, Cartage and Wesco, could start anew with a lawful tender offer, presumably starting at $20 which Wesco had previously offered and proceeding from that point forward in lawful, open competition.

At the time the motion for preliminary injunction was heard, assuming a finding of an illegal tender offer by Cartage, the court could have restrained the proposed merger and ordered Cartage to refrain from purchasing any more shares for a reasonable time to permit plaintiff or anyone else an opportunity to tender through Cartage to the original owners of Cartage's DIBC stock. Of course, such a tender offer would, of practical necessity, have been at a price in excess of the price that each of the shareholders originally sold their shares to entice them to accept the new tender offer.

The fact that plaintiff is proceeding in his own self interest does not automatically conflict with the interests of the DIBC shareholders. An analysis of this subject is described in a well reasoned article, *Standing to Sue Under the Williams Act,* the Business Lawyer, Vol. 34, November, 1978, where the author writes with respect to "Standing to Tender Offerors":

> "In sum, there are major differences between implied injunctive and money damage actions by tender offerors under the Williams Act, not the least of which is the fact that money damage actions are inherently and almost exclusively selfish ventures, which, in the Supreme Court's view, confer no benefit on the

intended beneficiaries of the Williams Act—the target company's shareholders. Properly framed injunctive actions, in sharp contrast, can be directly beneficial to target company shareholders, a conclusion that should not be diminished by the fact that the motivation for the institution of such a lawsuit may be equally as selfish as the motivation for the institution of a damage action." (p. 184)

In fact, after the court dismissed Luptak's Section 14 claims, at the hearing on October 17, 1979 in connection with Cartage's renewed motion for summary judgment, the court did, for the first time, enter into a dialogue with Luptak's counsel about how Luptak's action and desired equitable relief would benefit the DIBC shareholders. The shaping of equitable relief to protect all of the DIBC shareholders was urged upon Judge Freeman to no avail as follows:

"THE COURT: Was it the purpose of Luptak to protect the shareholders?

MR. KRATCHMAN: I think that is one of his purposes. I think that his purpose in allowing the shareholders to receive legitimate, lawful offers is consistent with his selfish interest. I think that those interests coincide, that they are inseparable. As long as the shareholders may benefit through his action, they are a beneficiary. . .

* * *

THE COURT: Of course, if Luptak was going to be a tender offeror, he would hope not, wouldn't he? He wants to get the stock just as cheap as he can.

MR. KRATCHMAN: But he wants—all the players have to start at the starting line and follow the law. If the market, if proper competitors—Wesco, Cartage, Luptak, Ipex—if they all start at the starting line and they say, "We will start bidding in conformity with

law", then the shareholders are the only beneficiary of that fair contest. Wesco started the bidding at $20 a share. . .

. . . if the court finds that there are violations of law, that the court through its equity powers can return all the players to the starting line, and that the injunctive relief awarded by the court can be shaped so it can only benefit the shareholders and not hinder or harm the shareholders.

If the court will follow me through on that line of reasoning, if the court were to find that all of Cartage's shares were acquired illegally, that would not preclude Cartage from making a legal tender offer. The shares would not have to be rescinded perhaps by the injunctive order of this court. If Central Cartage said that it wished to stand by its $25 offer to all the shareholders, the ones who sold their shares at 20, 21, 22, and 23, if they were to make that announcement, the court would not have to rescind any of the shares. It could give the shareholders the right but not the obligation to rescind their shares, and from the moment that that order went into effect all the other tender offerors potential, Luptak, Ipex, would know that the race was not starting afresh, that Cartage was offering $25 a share, as they had already offered, and the race would get off to a fair start.

THE COURT: I think we will go on to something else."

Luptak should not be deprived of his standing to prove violations of the 1934 Act by Cartage because his tender offer is "conjectural" in its commencement upon first obtaining an injunctive remedy to deny to Cartage the advantage flowing from an illegal tender offer. There was no finding or implication that Luptak was not financially able to make an offer. The law announced by the Court of Appeals is that an illegal tender offer, once made, and

successful, is immunized as a matter of law, from legal challenge by a competitor who wishes to make a legal tender offer.

CONCLUSION

The decision below presents an important issue in the proper enforcement of the securities laws. Because of the restrictive reading of a decision of this Court, and other lower courts, the decision below should be reviewed by this Court. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,
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APPENDIX

No. 80-1009
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY D. LUPTAK,
Plaintiff-Appellant

v.

CENTRAL CARTAGE COMPANY and
CENTRA, INC.,
Defendants-Appellees

ORDER
(Filed: February 23, 1981)

Before: MERRITT, BROWN and KENNEDY, Circuit Judges.

In this securities case plaintiff, Jerry Luptak, appeals two orders entered by the district court that cumulatively denied his motion for partial summary judgment and a preliminary injunction and granted defendants' motions for summary judgment on all counts. This case arises from the attempts of several parties to obtain control of Detroit International Bridge Co. (DIBC), whose principal asset is the Ambassador Bridge connecting Detroit and Windsor, Ontario. Before launching an intended offer, Luptak, an owner of 200 shares of DIBC stock, sought approval from the Canadian Foreign Investment Review Agency, which he thought necessary because of DIBC's ownership of Canadian assets. Approval was obtained in November 1977. In the interim several other parties made large-scale purchases of DIBC stock. By early 1977 Wesco Financial Corp. had acquired 10.6% of DIBC's outstanding share, and in October Wesco increased its ownership to 24.6% of the stock, by way of a tender offer. Defendant Central Cartage Co. (a subsidiary of Centra, Inc.), which had owned a small amount of DIBC stock, purchased shares from mid-October 1977 through December 1978, bringing its ownership to

24.6% of the outstanding stock. Early in 1979 Cartage loaned funds to Fallbridge Holdings Ltd., a Canadian corporation, to purchase the stock held by Wesco. The sale was consummated in March at $24 per share. Cartage and Fallbridge entered into an agreement in April, by which DIBC would transfer its Canadian subsidiary, Canadian Transit Co., to Fallbridge, DIBC would merge into a subsidiary of Cartage, and $24 per share would be paid for purchase of DIBC stock. On July 31, 1979, the shareholders of DIBC (over 49% of whose stock was then owned by Cartage and Fallbridge) approved the transaction. In August DIBC was dissolved and its shareholders received their payments.

Luptak instituted this action on January 10, 1978, alleging, *inter alia,* that Cartage engaged in a tender offer in violation of §§ 14(d) and (e) of the Act and that it misrepresented the purpose of its purchases in violation of §§ 10(b) and 13(d). In addition to damages, Luptak sought an injunction restraining Cartage from voting its shares of DIBC acquired since September 30, 1977 (the date Wesco announced its tender offer) and divestiture of those shares. The action was proceeding toward trial until June 1979 when Cartage announced the intended merger with DIBC. Luptak then moved for a preliminary injunction to restrain Cartage from voting its shares of DIBC and for summary judgment on the § 14 claim. Cartage brought its own motion for summary judgment on all the substantive grounds and on the ground that Luptak lacked standing. On July 30, 1979, the district court held that Luptak lacked standing to sue for either monetary or injunctive relief under § 14; that even if he had standing, the § 14 claim failed on its merits because Cartage's purchases did not constitute a tender offer; that Luptak lacked standing to sue for damages under § 10(b) but that he retained standing to sue for injunctive relief under that section; and that genuine issues of fact existed in the § 13(d) claim making summary judgment inappropriate under F.R.Civ.P. 56. App. 394-409. Upon

Cartage's renewed motion for summary judgment as to the remaining causes of action, on October 19, 1979, the district court dismissed all claims, on the grounds that the reasoning resulting in dismissal of the request for injunctive relief under § 14 applied to a similar request under § 10(b), and that *Piper* v. *Chris-Craft* applied to § 13(d) suits as well as those brought under § 14(e). App. 503-14.

We agree with the district court's opinions denying plaintiff standing to proceed with these claims. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), held that § 14(e) of the Securities Exchange Act of 1934 was meant solely to protect investors who are confronted by a tender offer and that, therefore, a competing tender offeror had no standing to sue for damages under that statutory provision. Although Luptak owns stock in DIBC, he prosecuted this suit because of disappointments faced as a potential tender offeror, and as such *Piper* forecloses his bringing a suit for damages under § 14 of the Act. We agree that the request for injunctive relief under § 14 should be dismissed according to the test in *Weeks Dredging & Contracting, Inc.* v. *American Dredging Co.*, 451 F.Supp. 468 (E.D. Pa. 1978), and *Humana, Inc.* v. *American Medicorp, Inc.*, 445 F.Supp. 613 (S.D.N.Y. 1977). Luptak concedes that he has standing to assert this claim only if the relief requested would benefit the shareholders of DIBC. This he has failed to show. The benefits to flow from a possible offer by Luptak are at best conjectural, because he has refused to take any steps beyond seeking approval from Canadian authorities in 1977 toward engaging in an offer. And as noted by the district court, granting Luptak the relief requested may very well harm shareholders of DIBC.

Luptak has no standing to sue for damages under § 10(b) of the 1934 Act, according to *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). The reasoning applied by the district court, relying upon *Crane Co.* v. *American Standard, Inc.*, 603 F.2d 244 (2d Cir. 1979), to

deny Luptak standing to sue under § 10(b) for injunctive relief as well, is persuasive. Section 14 is more relevant to the interests of a competing tender offeror than § 10(b), so given the denial of standing under § 14, Luptak *a fortiori* has no standing under § 10(b). Finally, we agree with the district court that the identity in legislative purpose between § 14(e) and § 13(d) of the Act, discussed by the Supreme Court in *Piper*, compels the dismissal of the § 13 claims once a lack of standing to sue under § 14 has been found.

Accordingly, we affirm the district court judgment dismissing all claims, on the ground that Luptak lacked standing to pursue this action. We need not, therefore, address the issue whether defendants' challenged transactions constituted a tender offer within the meaning of § 14 of the Act.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

Memorandum Opinion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JERRY D. LUPTAK,
Plaintiff,

v. Civil No. 8-70068

CENTRAL CARTAGE CO., ET AL.,
Defendants.

MEMORANDUM OPINION
(Filed: July 30, 1979)

Plaintiff, Jerry D. Luptak, filed this action on January 10, 1978, seeking individual relief, derivative relief for all shareholders of the Detroit International Bridge Company ("DIBC"), and class relief for both present and former DIBC shareholders who sold their DIBC stock in transactions alleged to be unlawful under the provisions of the Securities Exchange Act of 1934 ("Exchange Act") and the rules and regulations promulgated thereunder. The dispute centers on the attempts of various corporations to acquire control of DIBC and its principal asset, the Ambassador Bridge, which spans the Detroit River from Detroit to Windsor, Ontario. Federal question jurisdiction was asserted in this matter under 28 USC §1331. Named as defendants in the original complaint were Central Cartage Company ("Cartage"), Centra, Inc. ("Centra"), Wesco Financial Corporation ("Wesco"), Blue Chip Stamps ("Blue Chip"), DIBC and DIBC's board of directors. Fallbridge Holdings, Limited ("Fallbridge"), a Canadian corporation controlled by Cartage, was named as an additional defendant in plaintiff's first amended and supplemental complaint, which was filed on April 11, 1979.

Memorandum Opinion

On January 24, 1979, this Court denied plaintiff's motion to certify a class in this action and also granted defendants' motion to dismiss the derivative aspects of the lawsuit. The Court also granted partial summary judgment in favor of defendants Wesco and Blue Chip. Upon defendants' motion for reconsideration, on April 30, 1979 this Court granted summary judgment in favor of defendants Wesco and Blue Chip as to all remaining portions of plaintiff's complaint. On the basis of the Court's ruling, DIBC and the board of directors were dismissed from the action shortly thereafter.

The remaining claims in this lawsuit consist of plaintiff's assertions, in his individual capacity as the holder of 200 shares of DIBC common stock, that Cartage[1] engaged in an unlawful tender offer within the meaning of section 14(d) of the Exchange Act, that it also violated sections 13(d), 14(e) and 10(b) of the Act, and that defendant Fallbridge violated sections 14(d) and 14(e) of the Act by aiding and abetting the actions of Cartage. On the basis of the alleged section 14(d) violations, plaintiff now seeks a partial summary judgment against the remaining defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure ("F.R.C.P."). Plaintiff also seeks a preliminary injunction pursuant to F.R.C.P. 65 enjoining defendants from further acquiring any shares of DIBC common stock, from voting any DIBC shares acquired since September 30, 1977, and requiring defendants to return all shares of DIBC acquired since September 30, 1977, or, if that is impracticable, requirng defendants to sell those DIBC shares in the open market. In addition to opposing plaintiff's motions, defendants Cartage and Centra have moved for a full summary judgment in their favor under F.R.C.P. 56.[2] Because the motions of the

[1] Centra is the controlling stockholder of Cartage and owns all of its outstanding stock. It is understood that the claims against Centra result from the alleged unlawful conduct of Cartage.

[2] To this date, counsel for defendant Fallbridge has not appeared in this case. Accordingly, neither a response to plaintiff's motions nor a motion on its own behalf has been filed by defendant Fallbridge.

parties involve overlapping issues of law and fact, this Court consolidated them for hearing, and will dispose of them together in this memorandum opinion.

Although the Court has reviewed the factual basis of this lawsuit in its previous memorandum opinions in this case, a recitation of the relevant undisputed facts is necessary to resolve the motions currently before the Court. Those undisputed facts are as follows.

In November of 1975, plaintiff notified DIBC of the intention of a corporation under his control, Americana Limited, to make a tender offer to DIBC shareholders. Plaintiff informed DIBC that he would first obtain the required Canadian government approvals before making the tender offer. Although the Foreign Investment Review Agency of Canada notified plaintiff in early November of 1977 that the Canadian government had approved the proposed acquisition by Americana of the Canadian subsidiary of DIBC, plaintiff never made his tender offer. Plaintiff asserts that his failure to make the offer resulted from conduct of defendant Cartage and former defendant Wesco.

On September 30, 1977 Wesco issued a written offer to purchase all outstanding shares of DIBC stock at a price of $20 per share. Unless extended, the offer was to remain open until October 25, 1977, provided that all tenders of DIBC stock made pursuant to the offer would be irrevocable after 1:00 p.m. Los Angeles time, October 10, 1977. Meanwhile, on October 5, 1977, another corporation, Ipex of Michigan, publicly offered to purchase shares of DIBC at $22.50 per share. Wesco subsequently allowed its offer to expire on October 25, 1977; at that point it had acquired 181,538 outstanding shares of DIBC above its original 134,262 shares, bringing its total direct and indirect ownership of DIBC to 315,800 shares, or approximately 24.6 percent.

On September 1, 1977 Cartage held 31,944 shares, or 2.5 percent, of the outstanding shares of DIBC. Between October 17, 1977 and October 25, 1977 First of Michigan Corporation, a securities broker, purchased 111,100 shares of DIBC stock for Cartage in a series of over-the-counter market transactions at prices between $21 and $22 per share. Between October 26, 1977 and December 31, 1978, Cartage acquired an additional 168,631 shares of DIBC stock in over-the-counter market transactions. As of December 31, 1978 Cartage held 311,675 shares, or approximately 24.6 percent, of DIBC's outstanding common stock.

On November 4, 1977, Cartage filed a Schedule 13D under section 13(d) of the Exchange Act, stating, among other things, that as of October 25, 1977 it had become an owner of more than five percent of the outstanding stock of DIBC and that its purpose in acquiring those shares was as follows:

> Since its first purchase in August, 1972, the Company [Cartage] has regarded ownership of DIBC Common Stock as a sound investment. The Company did not at the time of the purchases described herein and does not presently have any plan to acquire control of DIBC, although the Company has in the past analyzed the results of and considered the possibility of acquiring control of DIBC. The Company may consider seeking representation on the Board of Directors of, or may suggest business strategies, which might include acquisitions, dispositions, and changes in dividend policy, to DIBC in the future. The Company may consider the possibility of acquiring control of DIBC in the future. The Company has not had any discussions with DIBC with respect to acquisition of control, representation on the Board of Directors, or business strategies, and it should not be assumed that the Company will formulate a plan to acquire control of DIBC or seek representation on the Board of Directors of DIBC or suggest business

> strategies to DIBC. The Company intends to continuously review its position in DIBC and may, dependint on its evaluation of DIBC's business and prospects and upon future developments (including, but not limited to, the attitude of the Board of Directors and management of DIBC, general economic conditions and money and stock market conditions), determine to increase or decrease its position in DIBC. The Company does not presently intend to make a tender offer for shares of DIBC or propose to DIBC a merger or similar transaction. As part of its continuing review of its position in DIBC, the Company may change its present intention and determine to make a tender offer for shares of DIBC or propose to DIBC a merger or similar transaction.

In early March of 1979 Cartage loaned to Fallbridge (then doing business as 90925 Canada Limited) the money to purchase from Wesco at $24 per share the shares of DIBC which Wesco owned directly and indirectly. The sale was consummated on March 12, 1979, with Wesco transferring its shares to Fallbridge and representing to Cartage and Fallbridge that its right to transfer the shares was free of any claim or restriction except those resulting from two pending lawsuits, *Luptak* v. *Wesco Financial Corp.*, and the present suit, *Luptak* v. *Central Cartage Co.* As a result of this transaction, Cartage consolidated over 49 percent of DIBC's outstanding shares under its control, subject to a reversion of 24.6 percent of the shares to Wesco.

In early June 1979, DIBC issued a written "Notice of Special Meeting of Shareholders," to be held in Detroit, Michigan in early July to act on the following matter:

> Approval of an Agreement of Sale of Certain Assets and Merger, which includes the adoption of a plan to complete liquidation of the Company, pursuant to which certain assets of the Company would be sold to

> Fallbridge Holdings Limited, the Company would be merged into Ambri, Inc., a Michigan corporation (and a wholly-owned subsidiary of Central Cartage Co.), and shareholders of the Company would receive $25.00 per share in cash . . . .

The accompanying proxy statement described Fallbridge as follows:

> Fallbridge Holdings Limited, a Canadian Federal Corporation, is a wholly-owned subsidiary of Fallbrook Holdings Limited, an Ontario Corporation ("Fallbrook") controlled by members of the Mendelson family of Toronto, Canada. It is engaged in no business and has no assets other than 315,800 shares of the Company's Common Stock, which it purchased from Wesco Financial Corporation ("Wesco") and certain insurance affiliates of Wesco in March, 1979 at $24.00 per share. Central Cartage loaned to Fallbridge the funds used by Fallbridge to purchase such shares.

In the proxy statement, DIBC disclosed that in early June the Canadian Attorney General filed a motion in the Federal Court of Canada requesting an order enjoining Fallbridge and Cartage from taking any action intended or likely to adversely affect the value of Canadian Transit Company, a wholly-owned Canadian subsidiary of DIBC, as a going concern. After the proxy statement was issued, the Federal Court of Canada issued the preliminary injunction sought by the attorney general, effective until July 30, 1979, or until the Canadian government approves the proposed DIBC transactions, whichever occurs earlier.

Plaintiff's Motion for Partial Summary Judgment and a Preliminary Injunction

Based on the above undisputed facts, plaintiff has now moved for a partial summary judgment and a preliminary injunction, contending that the totality of Cartage's conduct

(as aided and abetted by Fallbridge) constituted a tender offer within the meaning of section 14(d) of the Exchange Act; therefore, in plaintiff's view, Cartage's conceded failure to comply with the requirements of section 14(d) and rule 14d-1 renders it (and Centra and Fallbridge, as an aider and abettor) liable for section 14 violations as a matter of law.

At the outset, defendants Cartage and Centra raise serious questions regarding plaintiff's standing to sue for alleged violations under section 14 of the Exchange Act. Relying primarily on the Supreme Court's decision in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), which held that a tender offeror, suing in his capacity as a tender offeror, may not maintain an action for money damages under section 14(e) of the Act, defendants argue that plaintiff Luptak has no standing to complain of any alleged section 14 violations by Cartage. The issues raised by this argument are complicated by two additional factors. First, although Luptak's remaining claims in this action are brought in his individual capacity as a DIBC shareholder, he freely admits that a basic purpose of his action is to provide him with "the opportunity of making a proper tender offer to all DIBC shareholders." As this Court noted in its memorandum opinion of January 24, 1979, plaintiff's individual stake in the outcome of the suit as a shareholder is minimal when compared with his interest as a potential offeror. Thus, although plaintiff seeks relief as a DIBC shareholder, it would be more realistic to characterize him as a competing tender offeror for purposes of determining his standing to bring his section 14 claims. Under the Supreme Court's rationale in *Chris-Craft*, emphasizing that section 14 and other provisions of the Williams Act were intended to benefit shareholders rather than competing offerors, Luptak would appear to have no standing to bring a private action for money damages under any subdivision of section 14. *See* 430 U.S. at 35.

Second, the Court in *Chris-Craft* expressly limited its holding to actions for money damages under section 14(e). *See, e.g.*, 420 U.S. at 47 n.33. In the present case, plaintiff Luptak seeks not only money damages, but injunctive relief as well. This, even if *Chris-Craft* bars plaintiff's claim for damages, it is by no means clear that the decision precludes plaintiff from bringing an action for injunctive relief. Indeed, at least two federal courts have ruled that even after *Chris-Craft* a tender offeror has standing to sue for equitable relief under section 14. *Weeks Dredging & Contracting, Inc.* v. *American Dredging Co.*, 451 F. Supp. 468 (E.D. Pa. 1978); *Humana, Inc.* v. *American Medicorp., Inc.*, 445 F. Supp. 613 (S.D.N.Y. 1977). The critical inquiry under these decisions, however, is whether the shareholders of the target company would benefit if the allegations of plaintiff's complaint were proven and the relief requested were granted. *Humana, Inc.* v. *American Medicorp., Inc., supra* at 616.

In the present case, plaintiff Luptak has not even asserted that any benefit will accrue to the DIBC shareholders if Cartage is enjoined and forced to sell its DIBC shares on the market. Realistically, it appears that precisely the opposite will be true. As this Court found in its memorandum opinion of January 24, 1979, court-ordered divestiture could well result in a drop in price of DIBC stock; while such a result would clearly benefit Luptak as a tender offeror, since he could acquire DIBC shares at a reduced price, it certainly would be harmful to current DIBC shareholders. Under the authorities cited, these considerations persuade the Court that plaintiff Luptak cannot assert standing to sue the remaining defendants in this action for any alleged violations of section 14 of the Act.

Even assuming that plaintiff Luptak did have standing to sue, the Court would be constrained to reject his section 14 claims for another reason. As plaintiff himself recognizes, the requirements imposed under section 14 apply only when

a tender offer has been made. Under the circumstances of the present case, however, the Court finds it impossible to conclude that even the totality of Cartage's conduct could be held to constitute a tender offer within the meaning of section 14.

Under the Exchange Act, the term "tender offer" is not defined, and its precise contours elude even judicial definition. It is well settled, however, that the term embraces not only conventional tender offers, but other activities designed to lead to an offer of shares. *Cattleman's Investment Co.* v. *Fears,* 343 F. Supp. 1248 (W.D. Okla. 1972).

On the other hand, it is equally well settled that purchases of stock on the market, however aggressive, do not constitute a tender offer. *Kennecott Copper Corp.* v. *Curtiss-Wright Corp.,* 449 F. Supp. 951 (S.D.N.Y. 1978), *aff'd on this issue,* 584 F.2d 1195 (2d Cir. 1978); *D-Z Investment Co.* v. *Holloway,* [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,771 (S.D.N.Y. 1974); *Water & Wall Assoc. Inc.* v *American Consumer Industries,* [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,943 (D. N.J. 1973). As noted in a very recent decision, *Brascan Ltd.* v. *Edper Equities Ltd,* [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,882 (S.D.N.Y. 1979), both the provisions of the Williams Act and its legislative history reveal that the Act was passed with full awareness of the difference between tender offers and large scale stock accumulations on the market. Indeed, the regulatory scheme established by the Act is incompatible with its application to programs of market purchasing; the provisions of sections 14(d)(5)-(7) would be rendered unworkable if section 14 were held applicable to large scale market transactions. *Id.; Kennecott Copper Corp.* v. *Curtiss-Wright Corp.,* 584 F.2d 1195 (2d Cir. 1978). As the court stated in *Branscan:*

> The consequence of bringing such large scale open market and privately negotiated purchases within the scope of the Williams Act would be to rule, in

> effect, that no large scale acquisition program may be lawfully accomplished except in the manner of a conventional tender offer. While this may be a sensible legislative provision, . . . there is nothing in the legislative history or the text of the Williams Act which suggests that it intended to bring about such consequences.

Branscan Ltd. v. *Edper Equities Ltd., supra* at 95,632.

In the present case, there is no dispute that Cartage acquired its shares of DIBC through a series of over-the-counter market transactions. The rationale of the above-cited authorities accordingly would seem to dictate that Cartage's acquisitions be held to be outside the scope of section 14. Plaintiff argues, however, that Cartage's purchases take on a different hue because they were accomplished under the "umbrella" of the Wesco tender offer. Unfortunately, plaintiff cites no case authority to support this proposition, and this Court has been able to find none.

The cases on which plaintiff does rely arose in factual circumstances very different from the case at bar. In *S-G Securities, Inc.* v. *Fuqua Investment Co.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,750 (D. Mass. 1978), the purchaser did far more than merely make open market purchases. After having several meetings with management of the target company to discuss a cash tender offer for a fixed number of shares. Fuqua publicly announced that it was making a tender offer. Subsequently, it made two additional announcements disclosing the specific terms of its tender offer proposal, including the number of shares to be purchased and a premium price. These announcements were carried over the Dow Jones broad tape and were reported in the Wall Street Journal. Even though Fuqua did make market purchases, it clearly was soliciting share-

holders directly by publicly announcing its intention to purchase a certain number of shares at a specified price for the purpose of acquiring control.

None of these factors is present in the case at bar. Cartage did not contact management or make any public announcement concerning its investment in DIBC. There was no general solicitation of shareholders nor was there any public announcement of a Cartage tender offer for a specific number of shares at a particular price. Cartage simply purchased, over an extended period of time, shares of DIBC being offered in the market at then-current market prices. The fact that some of these purchases were made during the Wesco tender offer does not change the basic nature of the transactions.

The other case upon which plaintiff relies, *Wellman* v. *Dickinson*, No. 78 Civ. 284 (RLC) (S.D.N.Y. July 9, 1979) does not assist his position. The case did not involve open-market purchases, but rather a plan to secretly solicit a large number of sellers in a nation-wide effort to obtain control of the target within a matter of days. The offer in *Wellman* further was conditional upon the offeror obtaining 20 percent of the outstanding stock. Once again, none of the *Wellman* factors can be found in the present case. In fact, the *Wellman* court recognized that under the authority of the *Kennecott* case open market transactions such as are involved in the case at bar do not constitute a tender offer. The court stated: "Moreover, the transactions in *Kennecott* were in large part effectuated on the floor of the exchange and it is clear that open market purchases are not subject to Section 14's pre-acquisition filing requirements. That certainly was not the case here." *Id.* at 50.

For the reasons already stated, this Court must find that even if plaintiff Luptak had standing to assert section 14 violations by Cartage, his section 14 claims would fail on their merits because the conduct of Cartage did not constitute a tender offer within the meaning of section 14. Ac-

cordingly, since plaintiff has not demonstrated that he is entitled to judgment as a matter of law, his motion for partial summary judgment against Cartage, Centra and Fallbridge will be denied. Likewise, since plaintiff has failed to show a likelihood of success on the merits of his claims under section 14(d), his motion for a preliminary injunction also will be denied.

Defendants' Motion for Full Summary Judgment

A. The Section 14 Claims

Because this Court has found both that plaintiff has no standing to assert his claims under section 14 of the Exchange Act and that Cartage's market purchases of DIBC stock did not constitute a tender offer under section 14, it must determine that defendants Cartage and Centra are entitled to judgment as a matter of law on those portions of plaintiff's complaint alleging violations of sections 14(d) and (e) of the Act and the rules promulgated thereunder. Accordingly, and for the reasons stated in this memorandum opinion, the motion of Cartage and Centra for summary judgment as to those counts of the complaint under section 14 of the Exchange Act will be granted.[3]

B. The Section 10(b) and Rule 10b-5 Claims

Cartage and Centra also seek a summary judgment in their favor as to plaintiff's claims under section 10(b) of the Exchange Act and its corresponding rule 10b-5 to the effect that Cartage misrepresented material facts and engaged in a fraudulent scheme in connection with its purchases of DIBC stock. To the extent that plaintiff's complaint seeks money damages for the alleged 10(b) and 10b-5 violations, defendants' motion must be deemed to be well taken. Since plaintiff was neither a seller nor a purchaser of the DIBC

[3] Although disposition of the section 14 issues as to Cartage and Centra would appear dispositive of plintiff's claims against Fallbridge, this Court cannot grant a summary judgment in favor of Fallbridge absent any appearance on its behalf. See note 2, *supra*.

shares, he has no standing to sue for money damages under section 10(b) or rule 10b-5. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). The Supreme Court's decision in *Blue Chip Stamps*, however, is narrow insofar as it is limited to actions for damages under section 10(b). Whether a non-purchaser or non-seller of securities may bring an action for injunctive relief under that section presents a wholly different question.

Before the Supreme Court's decision in *Blue Chip Stamps* adopting the so-called *Birnbaum* standing rule in section 10(b) actions, see *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.) *cert. denied*, 343 U.S. 956 (1952), courts accepting *Birnbaum's* purchaser-seller requirement in section 10(b) damage actions refused to apply it to equitable actions under section 10(b). *See, e.g., James* v. *Gerber Products Co.*, 483 F.2d 944 (6th Cir. 1973). As the Sixth Circuit Court of Appeals noted in *James*, courts have been extremely sensitive to effectuating section 10(b)'s intent to protect the investing public and to ensure honest dealings in securities transactions. *Id.* at 948. *Blue Chip Stamps* did not overrule such authorities; indeed, its distinction between equitable actions and actions for money damages persuades this Court that cases such as *James* retain continuing vitality. Accordingly, this Court finds that even though plaintiff was not a seller or purchaser of DIBC shares, he does have standing to sue for injunctive relief under section 10(b) and rule 10b-5. Defendants' motion for summary judgment as to plaintiff's claims for injunctive relief under section 10(b) and rule 10b-5, therefore, will be denied.

C. The Section 13(d) Claims

Plaintiff has also sought injunctive and monetary relief for alleged violations of section 13(d) of the Exchange Act by defendant Cartage. Specifically, plaintiff alleges that Cartage intentionally filed a materially false and misleading Schedule 13D under rule 13d-1 by not disclosing the pur-

pose and intent of its acquisition of the DIBC shares. Defendants Cartage and Centra seek a summary judgment as to those portions of plaintiff's complaint, asserting that Cartge's purchases of DIBC stock and its Schedule 13D did not violate section 13(d) of the Act.

A review of Cartage's Schedule 13D reveals that genuine issues of material fact remain as to plaintiff's section 13(d) claims. Cartage's purpose and intent at the time it acquired a five percent interest in DIBC remains genuinely disputed, with plaintiff alleging that Cartage intended to acquire control of DIBC and defendants arguing that Cartage possessed no such intent at the time the Schedule 13D was filed. Under such circumstances, summary judgment under Rule 56 of the Federal Rules of Civil Procedure is clearly improper. Defendants' motion as to plaintiff's section 13(d) claims, therefore, will be denied.

Summary

For the reasons stated in this memorandum opinion, plaintiff's motions for a partial summary judgment and a preliminary injunction shall be denied. The motion of defendants Cartage and Centra for full summary judgment shall be granted in part and denied in part, as provided in this opinion. No costs shall be awarded at this time.

An appropriate order shall be submitted.

(s) RALPH M. FREEMAN
United States District Judge

Dated: July 30, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JERRY D. LUPTAK,
Plaintiff,

-vs-

CENTRAL CARTAGE CO., Et Al.,
Defendants.

Civil No. 8-70068

MEMORANDUM OPINION

(Filed: October 19, 1979)

Plaintiff, Jerry Luptak, filed this action on January 10, 1978, seeking individual relief, derivative relief for all shareholders of the Detroit International Bridge Company ("DIBC"), and class relief for both present and former DIBC shareholders who sold their DIBC stock in transactions alleged to be unlawful under the provisions of the Securities Exchange Act of 1934 ("Exchange Act") and the rules and regulations promulgated thereunder. The dispute centers on the attempts of various corporations to acquire control of DIBC and its principal asset, the Ambassador Bridge, which spans the Detroit River from Detroit to Windsor, Ontario. Federal question jurisdiction was asserted in this matter under 28 USC §1331. Named as defendants in the original complaint were Central Cartage Company ("Cartage"), Centra, Inc. ("Centra"), Wesco Financial Corporation ("Wesco"), Blue Chip Stamps ("Blue Chip"), DIBC and DIBC's board of directors, Fallbridge Holdings, Limited ("Fallbridge"), a Canadian corporation controlled by Cartage, was named as an additional defendant in plaintiff's first amended and supplemental complaint, which was filed on April 11, 1979. Subsequently, the Clerk of this Court entered the default of defendant Fallbridge for failure to plead or otherwise defend, pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.[1]

[1] The default was entered on July 25, 1979. Plaintiff has yet to seek a default judgment against defendant Fallbridge under Rule 55(b).

Memorandum Opinion

On January 24, 1979, this Court denied plaintiff's motion to certify a class in this action and also granted defendants' motion to dismiss the derivative aspects of the lawsuit. The Court also granted partial summary judgment in favor of defendants Wesco and Blue Chip. Upon defendants' motion for reconsideration, on April 30, 1979 this Court granted summary judgment in favor of defendants Wesco and Blue Chip as to all remaining portions of plaintiff's complaint. On the basis of the Court's ruling, DIBC and the board of directors were dismissed from the action shortly thereafter.

At that point in the litigation, the remaining claims in the lawsuit consisted of plaintiff's assertions, in his individual capacity, that Cartage[2] engaged in an unlawful tender offer within the meaning of section 14(d) of the Exchange Act, that it also violated sections 13(d), 14(e) and 10(b) of the Act, and that defendant Fallbridge violated sections 14(d) and 14(e) of the Act by aiding and abetting the actions of Cartage. On the basis of the alleged section 14(d) violations, plaintiff sought a partial summary judgment against the remaining defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure ("F.R.C.P."). Also on the basis of the alleged section 14 violations, plaintiff sought a preliminary injunction pursuant to F.R.C.P. 65 enjoining defendants from further acquiring any shares of DIBC common stock, from voting any DIBC shares acquired since the first alleged violation of the Exchange Act, and requiring defendants to return all such shares of stock, or, in the alternative, requiring defendants to sell those DIBC shares in the open market. In addition to opposing plaintiff's motions, defendants Cartage and Centra moved for sum-

[2] Centra is the controlling stockholder of Cartage and owns all of its outstanding stock. Throughout this litigation it has been understood that the claims against Centra result from the alleged unlawful conduct of Cartage.

mary judgment in their favor on all issues remaining in the lawsuit. The Court consolidated the motions for hearing, and in its Memorandum Opinion of July 30, 1979 ruled as follows:

1. Plaintiff lacked standing to sue the remaining defendants for either monetary or injunctive relief under section 14 of the Exchange Act.

2. Even if plaintiff did have standing to sue, the section 14 claims would fail on their merits because the conduct of Cartage did not constitute a tender offer within the meaning of section 14.

3. Plaintiff, as neither a purchaser nor a seller of the DIBC shares, lacked standing to sue for money damages under section 10(b) of the Exchange Act and its corresponding rule 10b-5.

4. The fact that plaintiff neither purchased nor sold the DIBC shares did not preclude his standing to sue for injunctive relief under section 10(b) and rule 10b-5.

5. Genuine issues of material fact existed as to plaintiff's claims under section 13(d) of the Exchange Act, making summary judgment inappropriate under Rule 56 of the F.R.C.P.

This matter is now before the Court on the renewed motion of defendants Cartage and Centra for summary judgment in their favor in light of recent authority which allegedly demonstrates that plaintiff lacks standing to pursue his claims for injunctive relief under section 10(b) and rule 10b-5 as well as his claims for both monetary and injunctive relief under section 13(d). Although the Court disagrees with the major thrust of defendants' arguments, it nevertheless has concluded for the reasons stated below that plaintiff lacks standing to assert any of his remaining claims under sections 13(d) and 10(b) and rule 10b-5. Accordingly, the Court holds that summary judgment must be

entered in favor of defendants Cartage and Centra as to all portions of plaintiff's complaint not previously dismissed as to them.

A. Plaintiff's Claims Under Section 10(b) and Rule 10b-5

Section 10(b) of the Exchange Act provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 USC §78j, Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as fraud or deceit upon any person, in connection with the purchase or sale of any security.
>
> 17 C.F.R. §240.10b-5.

On their original motion for summary judgment, defendants Cartage and Centra asserted that because plaintiff was neither a seller nor a purchaser of securities, he had no standing to assert any claims against them under section 10(b) and rule 10b-5. On the authority of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), the Court found defendants' position to be well taken as to plaintiff's claims for monetary relief. With respect to plaintiff's claim for injunctive relief, the Court went on to state:

> The Supreme Court's decision in *Blue Chip Stamps*, however, is narrow insofar as it is limited to actions for damages under section 10(b). Whether a non-purchaser or non-seller of securities may bring an action for injunctive relief under that section presents a wholly different question.
>
> Before the Supreme Court's decision in *Blue Chip Stamps* adopting the so-called *Birnbaum* standing rule in Section 10(b) actions, see *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.) *cert. denied*, 343 U.S. 596 (1952), courts accepting *Birnbaum's* purchase-seller requirement in section 10(b) damage actions refused to apply it to equitable actions under section 10(b). *See, e.g., James* v. *Gerber Products Co.*, 483 F.2d 944 (6th Cir. 1973). As the Sixth Circuit Court of Appeals noted in *James*, courts have been extremely sensitive to effectuating section 10(b)'s intent to protect the investing public and to ensure honest dealings in securities transactions. *Id.* at 948. *Blue Chip Stamps* did not overrule such authorities; indeed, its distinction between equitable actions and actions for money damages persuades this Court that cases such as *James* retain continuing vitality.

Memorandum Opinion of July 30, 1979 at 12. Accordingly, the Court held that the fact that plaintiff was neither a

purchaser nor a seller of the DIBC shares did not preclude his standing to sue for injunctive relief under section 10(b) and rule 10b-5.

Defendants now contend that plaintiff lacks standing to seek injunctive relief for a different reason. On the Authority of *Banuelos* v. *Choy*, Civil Action No. CV79-1171-FF (C.D. Cal. Aug. 14, 1979) defendants argue that in the present case plaintiff does not seek injunctive relief to prevent prospective violations of the Exchange Act, and as a result, is barred from proceeding by the purchaser-seller requirement of *Blue Chip Stamps*. As explained in the case of *Tully* v. *Mott Supermarkets, Inc.* 540 F.2d 187 (3d Cir. 1976), an exception to the purchaser-seller requirement in injunctive actions was

> designed to provide prophylactic relief in cases where no actual purchase or sale had been completed. It was not intended to supplant the traditional "purchaser-seller" limitation in cases, such as the present, involving a consummated illegal stock transaction . . . . [T]he application of the rule was restricted to those situations in which its preventative purpose could be achieved.

Id. at 195.

Defendants argue that because a merger of DIBC and Cartage was completed after this Court denied plaintiff's request for a preliminary injunction on July 30, 1979, plaintiff cannot demonstrate that the relief he seeks in this action is intended to prevent prospective violations of the Exchange Act. Accordingly, defendants argue, on the authority of such cases as *Banuelos* and *Tully*, plaintiff must be denied standing under section 10(b) and rule 10b-5.

The Court finds this argument without merit. Defendants overlook the fact that plaintiff, by the prayer for relief contained in his complaint, initially sought injunctive relief

to prevent the merger which Cartage completed during the pendency of this lawsuit. In contrast, plaintiffs in both *Banuelos* and *Tully* filed their lawsuits *after* the the disputed transactions had occurred. As plaintiff argues, in the present case the action was timely brought, and as a result plaintiff must be deemed to retain the right to seek injunctive relief until the conclusion of the action. More simply put, the Court is of the opinion that Cartage acted at its own risk when it consummated the DIBC merger during the pendency of this lawsuit; the fact that the merger was thus completed simply cannot be asserted as a ground upon which to deny plaintiff standing to sue.

In their brief on the present motion defendants go on to argue that plaintiff, in his position as a competing tender offeror,[3] is not an intended beneficiary of section 10(b) and rule 10b-5 and therefore has no standing to bring an action for damages under those provisions. *See Crane Co.* v. *American Standard, Inc.*, CCH Sec. L. Rptr. (Current Ed.) ¶95,823 (2d Cir. 1979). In light of this Court's prior holding that plaintiff has no standing to bring a 10(b) damage action under *Blue Chip Stamps*, defendants' argument would appear superfluous. It does, however, raise concerns which bear heavily upon the propriety of granting plaintiff standing to seek *injunctive* relief under section 10(b) and rule 10b-5,

[3] In its Memorandum Opinion of July 30, 1979, this Court found that "although plaintiff seeks relief as a DIBC shareholder, it would be more realistic to characterize him as a competing tender offeror . . . . Memorandum Opinion of July 30, 1979 at 6. The Court reasoned that although plaintiff's claims were presented in his capacity as a target shareholder, he freely admitted that the basic purpose of his action was to provide him with "the opportunity of making a proper tender offer to all DIBC shareholders." Further, as noted in the Court's Memorandum Opinion of January 24, 1979, plaintiff's individual stake in the outcome of the suit as a shareholder is minimal when compared with his interest as a potential offeror. Memorandum Opinion of January 24, 1979 at 16.

particularly in view of this Court's prior holding that plaintiff lacks standing to assert his claims for injunctive relief under section 14 of the Exchange Act. As explained more fully below, the Court has concluded that those concerns require a holding that plaintiff does not have standing to assert his claims for injunctive relief under section 10(b) and rule 10b-5 because an award of the relief which plaintiff seeks would not effectuate the legislative intent of those provisions.

In considering whether plaintiff had standing to assert his claims for injunctive relief under section 14 of the Exchange Act, the Court recognized that the critical inquiry was whether the shareholders of DIBC would benefit if the allegations of plaintiff's complaint were proven and the relief requested were granted. *Humana, Inc.* v. *American Medicorp., Inc.*, 445 F. Supp. 613, 616 (S.D.N.Y. 1977). The Court then observed:

> In the present case, plaintiff Luptak has not even asserted that any benefit will accrue to the DIBC shareholders if Cartage is enjoined and forced to sell its DIBC shares on the market. Realistically, it appears that precisely the opposite will be true. As this Court found in its memorandum opinion of January 24, 1979, court-ordered divestiture could well result in a drop in price of DIBC stock; while such a result would clearly benefit Luptak as a tender offeror, since he could acquire DIBC shares at a reduced price, it certainly would be harmful to current DIBC shareholders.

Memorandum Opinion of July 30, 1979 at 7. Accordingly, the Court concluded that under the *Humana* test plaintiff could not assert standing to seek injunctive relief under section 14 of the Exchange Act.

The Court is persuaded that a similar test should be applied to determine standing to sue for injunctive relief in section 10(b) actions. As the court pointed out in *Crane Co.*

v. *American Standard, Inc., supra* at 95,289, the legislative history of section 10(b) suggests that tender offerors were not the intended beneficiaries of that statute; section 10(b)'s antifraud provisions were enacted to protect the investing public, not competing tender offerors, against false and deceptive practices. The court further noted the substantial identity of the language in rule 10b-5, promulgated under section 10(b), and that in section 14(e):[4]

> A comparison of the statutory provisions at issue here and in *Piper* [v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977)] suggests that Crane does not have standing. As this court previously has observed, the operative language of Rule 10b-5 and §14(e) is substantially identical. . . . The primary difference is that Rule 10b-5 applies generally to activities "in connection with the purchase or sale of any security," whereas §14(e) deals specifically with tender offers. . . . This difference suggests that we should be less willing to imply a cause of action for a defeated offeror under the general provisions of Rule 10b-5 than under §14(e). We stated in *Crane I* [*Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970)] that the addition to the 1934 Act of §14(e) "should serve to resolve any doubts about standing in the tender offer cases . . . ." . . . Although we were in

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[4] Section 14(e) provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

15 USC §78n(e).

> error as to the way in which those doubts would be resolved, we adhere to our original belief that §14(e) presented a stronger argument for standing than does Rule 10b-5.

Id. at 95,288 (citations omitted).

This Court agrees with the court in *Crane* that section 14(e) presents a stronger argument for tender offeror standing to seek relief than does rule 10b-5. In light of this Court's prior holding that plaintiff has no standing to seek injunctive relief under section 14 because a grant of that relief would in all likelihood be detrimental to the target shareholders, this Court finds itself constrained to hold that plaintiff is similarly barred from seeking that same relief under the provisions of section 10(b) and rule 10b-5.

B. Plaintiff's Claims Under Section 13(d)

In defendants' prior motion for summary judgment no issue was made of plaintiff's standing to assert defendants' alleged violations of section 13(d) of the Exchange Act. Defendants simply argued that Cartage's purchases of DIBC stock and its Schedule 13D did not violate section 13(d). Upon finding that genuine issues of material fact remained as to plaintiff's section 13(d) claims—specifically, Cartage's purpose and intent at the time it acquired a five percent interest in DIBC—this Court held that summary judgment was improper under F.R.C.P. 56.

Defendants now argue that plaintiff lacks standing to seek either monetary or injunctive relief under section 13(d). On the issue of monetary relief, defendants argue that the reasoning of *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) applies with equal force in section 13(d) suits as in section 14(e) suits to deprive competing tender offerors of standing to sue for damages. Defendants correctly note that both section 14(e) and section 13(d) were enacted simultaneously as part of the Williams Act, P.L. 90-439

(July 29, 1968), which provides for increased disclosures in substantial acquisitions of securities in connection with tender offers and potential tender offers. In considering the legislative intent behind these provisions, the Supreme Court stated in *Chris-Craft:*

> The legislative history thus shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies. That tender offerors were not the intended beneficiaries of the bill was graphically illustrated by the statements of Senator Kuchel, cosponsor of the legislation, . . ."

430 U.S. at 28. The Court also stated:

> The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer. As we stated in *Rondeau* v. *Mosinee Paper Corp.*, [a case involving violations of section 13(d)] 422 U.S. at 58, 45 L.Ed, 2d 12, 95 S. Ct. 2069: "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without information. . . ." We find no hint in the legislative history . . . that Congress contemplated a private cause of action for damages by one of several contending offerors against a successful bidder or by a losing contender against the target corporation.

Id. at 35.

This language compels the Court to agree with defendants that Chris-Craft's analysis under section 14(e) applies with equal force to actions by competing tender offerors under section 13(d). Accordingly, the Court must hold that plaintiff lacks standing to seek monetary relief under section 13(d) for the same reasons he lacks similar standing under section 14(e).

Although plaintiff essentially concedes that the Supreme Court's holding in *Chris-Craft* bars his action for damages under section 13(d), *see* Plaintiff's Brief in Support of Response to Defendants' Motion for Summary Judgment at 2, 3, he maintains that his action for injunctive relief under section 13(d) is within the legislative purpose of that provision, and, as a consequence, he must be deemed to have standing to sue. The Court finds this position untenable. The conceded identity of legislative purpose behind section 13(d) and section 14(e) and the Supreme Court's language in *Chris-Craft* persuades the Court that the same analysis which led it to hold that plaintiff lacks standing to sue for injunctive relief under section 14(e) compels the conclusion that plaintiff likewise lacks standing to seek injunctive relief under section 13(d). *See* Memorandum Opinion of July 30, 1979 at 6-7. Thus, although for the reasons stated in section A. of this Memorandum Opinion the Court rejects defendants' "prospective relief" argument under *Banuelos* and *Tully* as applied to plaintiff's section 13(d) claims, it nevertheless concludes that defendants are entitled to summary judgment.

For the reasons stated in this Memorandum Opinion, summary judgment shall be entered in favor of defendants Cartage and Centra as to all portions of plaintiff's complaint not previously dismissed as to them. An appropriate order shall be submitted.

(s) RALPH M. FREEMAN
United States District Judge

Dated: October 19, 1979

Sections 14(d), 14(e), 10(b) and 13(d)
Securities and Exchange Act of 1934

1. Section 14(d), 15 U.S.C. § 78n(d) provides:

"It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 781 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 781(g) (2) (G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements,

in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

Sections 14(d), 14(e), 10(b) and 13(d)
Securities and Exchange Act of 1934

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tendes before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection."

2. Section 14(e), 15 U.S.C. § 78n(e) provides:

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

3. Section 10(b) 15 U.S.C. § 78j(b) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Sections 14(d), 14(e), 10(b) and 13(d)
Securities and Exchange Act of 1934

4. Section 13(d) 15 U.S.C. § 78m(d) provides:

"(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 781 of this title, or any equity security of a class which is registered pursuant to section 781 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 781(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank,

as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joing ventures, loan or option arrangements, puts or calls guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

* * *

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, direclty or indirectly, by (i) such person, and (ii) by each associate of such person giving the name and address of each such associate; and

* * *

Sections 14(d), 14(e), 10(b) and 13(d)
Securities and Exchange Act of 1934

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection."